AHMAD NAJIB ARIS

v.

PP

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
NIK HASHIM FCJ
AUGUSTINE PAUL FCJ
HASHIM YUSOFF FCJ
ZULKEFLI MAKINUDIN FCJ
[CRIMINAL APPEAL NO: 05-25-2007 (B)]
27 MARCH 2009

CRIMINAL PROCEDURE: *Accused - Right to silence - Whether infringed by the principle of 'if unrebutted would warrant a conviction' - Criminal Procedure Code, s. 180*

CRIMINAL PROCEDURE: *Appeal - Appellate court, power and duty of - Decision of High Court lacking specific findings and containing no reasons for its findings - Whether Court of Appeal empowered to review and re-evaluate all evidence adduced - Scope and nature of Court of Appeal's appellate powers*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Whether prima facie case required a maximum evaluation of prosecution's evidence - Whether court obliged to convict accused if accused remains silent at close of prosecution's case where prima facie case established - Whether accused's right to remain silent infringed by the principle of 'if unrebutted would warrant a conviction' - Criminal Procedure Code, s. 180*

EVIDENCE: *Confession - Rejection of - Appellate court rejecting confession of accused - Appellate court taking steps to determine whether sufficient evidence apart from confession to satisfy elements of the charges against accused - Appellate court determining whether sufficient evidence apart from confession to sustain convictions of accused - Whether approach of appellate court proper - Whether convictions ought to be set aside on the basis of rejected confession - Whether proper to order re-trial*

EVIDENCE: *Documentary evidence - Computer printout - Admissibility - Document not produced by computer in the course of its ordinary use - Manner of proving such document - Whether deeming provision under s. 90(A)(6) applicable - Evidence Act 1950, s. 90A*

A ***EVIDENCE:*** *Documentary evidence - Computer printout - Admissibility - Whether certificate under s. 90A(2) of Evidence Act 1950 the only method to prove document produced by a computer 'in the course of its ordinary use' - Whether document may be proved through oral evidence that document was produced by a computer in the course of its ordinary*
B *use and proof of matters specified under s. 90A(4)of Evidence Act 1950 - Evidence Act 1950, s. 90A*

EVIDENCE: *Documentary evidence - Video tapes and/or recordings - Admissibility - Whether subject to requirements of s. 90A Evidence Act*
C *1950 - Evidence Act 1950, s. 90A*

EVIDENCE: *Documentary evidence - Video tapes and/or recordings - Whether CCTV tapes and images were documents produced by a computer - Evidence Act 1950, s. 3*

D ***EVIDENCE:*** *Identification evidence - Quality of identification evidence - Accused positively identified by witnesses - Slight discrepancies in evidence concerning clothes worn by accused - Reasonable explanation for such discrepancies - Whether discrepancies material*

E ***EVIDENCE:*** *Identification parade - Irregularity in conduct of parade - Whether prosecution obliged to conduct identification parade in every case - Circumstances when identification parade ought to be conducted - Circumstances when Turnbull guidelines applicable*

F ***STATUTORY INTERPRETATION:*** *Construction of statutes - Deeming provision - Evidence Act 1950, s. 90A(6) - Scope and application of - Document not produced by computer in the course of its ordinary use - Manner of proving such document - Evidence Act 1950, s. 90A*

G ***WORDS & PHRASES:*** *'Computer' - Evidence Act 1950, s. 3*

WORDS & PHRASES: *'Document' - Evidence Act 1950, s. 3*

WORDS & PHRASES: *'If unrebutted would warrant a conviction' -*
H *Criminal Procedure Code, s. 180*

The appellant was convicted of rape and murder in the High Court. For the offence of rape, he was sentenced to 20 years' imprisonment and to 20 strokes of the cane. In respect of the murder he was sentenced to death. The appellant appealed to the
I Court of Appeal. The Court of Appeal found the decision of the High Court to be of no assistance, undertook its own examination

and evaluation of the evidence, but maintained the High Court's convictions and sentences. The appellant thus appealed to the Federal Court. In the Federal Court several grounds of appeal were raised. The significant issues *inter alia* concerned: (i) the appellate powers of the Court of Appeal; (ii) the nature and quality of the identification evidence against the appellant; (iii) the admissibility of documents produced by a computer pursuant to s. 90A of the Evidence Act 1950; and (iv) the approach of the court when an accused person chooses to remain silent after a *prima facie* case is established by the prosecution.

Held (dismissing the appeal)
Per Zulkefli Makinudin FCJ delivering the judgment of the court:

(1) The Court of Appeal was empowered to review or re-evaluate all the evidence adduced by the prosecution, notwithstanding that the High Court's decision lacked specific findings and contained no reasons for its findings. In a case involving pure questions of fact, the Court of Appeal is free to determine whether the various findings of the trial Court are correct. In the instant case, although the High Court's decision was of no assistance, the Court of Appeal had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal gave sound reasons why the evidence was admitted and how it implicated the appellant. No miscarriage of justice was caused to the appellant as the Court of Appeal's decision was based on evidence adduced from the witnesses called by the prosecution as recorded in the appeal records. (paras 20)

(2) The prosecution's evidence clearly showed that its witnesses (PW4 and PW5) had positively identified the appellant. Indeed, the Court of Appeal did not err in deciding that PW4 and PW5 had identified the appellant. The discrepancies in the identification evidence of the witnesses concerning the clothes worn by the appellant were not material. The important matter was the witnesses' positive identification of the appellant's face. Further, the Court of Appeal had given a reasonable explanation on the point in its grounds of judgment. (paras 21, 22, 23, 24, 25 & 26)

(3) The Court of Appeal had correctly arrived at a finding of fact on the issue of the appellant's lost identity card. This finding of fact was based on evidence adduced by the prosecution. (paras 27 & 28)

(4) The prosecution is not required to conduct an identification parade in every case. Where the primary issue concerns the identity of the accused or whenever the case against an accused person depends wholly or substantially on the correctness of one or more identification of the accused, which the defence alleges to be mistaken, the guidelines laid down in *Regina v. Turnbull & Anor* [1977] 1 QB 224 need to be followed and an identification parade conducted. In instant case the identification of the appellant by the witnesses was not based on a fleeting glimpse. There was also other forensic and supporting evidence connecting the appellant with the crime. In the instant case, the quality of the identification evidence was good and remained good throughout the prosecution's case. The question of mistaken identity could not therefore arise. Even discounting the identification parade, the prosecution witnesses had positively identified the appellant. (para 29)

(5) A certificate under s. 90A(2) of the Evidence Act 1950 is not the only method to prove that a document was produced by a computer 'in the course of its ordinary use' under s. 90A(1) of the Evidence Act 1950. Section 90A(6) deals with the admissibility of a document which was not produced by a computer in the course of its ordinary use and is only deemed to be so. The fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under s. 90A(2) or by way of oral evidence. Such oral evidence must consist not only of a statement that the document was produced by a computer in the course of its ordinary use but also of the matters presumed under s. 90A(4). The presumption contained in s. 90A(6) of the Evidence Act 1950 can be resorted to only when the document was not produced by a computer in the course of its ordinary use. *Gnanasegaran a/l Pararajasingam v. PP* [1997] 3 MLJ 1 (refd); *Hanafi Mat Hassan v. PP* [2006] 4 MLJ 134 (folld). (paras 30, 31, 32 & 33)

(6) In the instant case, no certificate was tendered under s. 90A(2) for proof of the chemist report. Further, no oral evidence was adduced to show that the report was produced by a computer. However, the report could be presumed to be produced in the course of the computer's ordinary use under s. 90A(6). Proof of the matters referred to under s. 90A(4) was also adduced through the evidence of a witness (PW27). The chemist report, which directly linked the appellant to the commission of the crimes charged, was thus admissible. (paras 34 & 35)

(7) CCTV tapes are documents produced by a computer by virtue of the definition ascribed to the words 'document' and 'computer' under s. 3 of the Evidence Act 1950. In the instant case, since the CCTV tapes tendered by the prosecution did not satisfy the requirements of s. 90A, they were inadmissible as evidence. (paras 36, 37, 38, 39 & 40)

(8) The Court of Appeal did not err in finding that the 'muslin cloth' seized from the appellant's office was of the same type as the cloth found wrapped around the deceased victim's neck and tied around her hands. This was a reasonable finding of fact considering: (i) the opportunity of access that the appellant had to such cloth which was readily obtainable from his workplace; (ii) the evidence of the storekeeper (PW 26) at the appellant's workplace; and (iii) the evidence of the chemist (PW27) who was an academically qualified expert with vast experience in fabric analysis. The Court of Appeal did not also err in its finding of fact that there was nobody else involved in the crime other than the appellant himself. (paras 41, 42, 43 & 44)

(9) The appellant had the opportunity to commit the crimes as charged. The evidence led by the prosecution led to the inference that it was probable that the appellant would take advantage of such opportunity. (para 45)

(10) The appellant's contention that the Court of Appeal had erred by affirming the convictions after rejecting his confession was without basis. There is no legal principle that a conviction should be set aside when a confession of an accused is rejected by the Court of Appeal. The Court of Appeal had the discretion to re-evaluate the remaining

A evidence and to scrutinize in totality such other evidence, apart from the confession to determine whether the evidence was sufficient to satisfy all the elements of the charges against the appellant. After taking such steps, the Court of Appeal was also obliged to scrutinize whether the evidence
B was sufficient to affirm the convictions against the appellant. In the instant case, there was sufficient evidence available before the Court of Appeal to support the finding of guilt made by the trial judge. There was thus no question of a re-trial. (para 46)

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(11) In the instant case the court had no choice but to convict the appellant on both charges as he had failed to rebut the evidence adduced by the prosecution's witnesses. The High Court had ruled that a *prima facie* case had been made out
D at the end of the prosecution's case. In coming to that decision, the High Court had relied on the maximum evaluation principle. *Looi Kow Chai & Anor. v. PP* (folld). An accused person's right to remain silent is not at all infringed by the principle of "*if unrebutted would warrant a conviction*".
E The evidence adduced must be such that it would warrant a conviction if unrebutted. In the instant case, the appellant's failure to call other witnesses to rebut the prosecution's case left the court with no other alternative but to convict him. *Balachandran v. PP* [2005] 1 AMR 321
F (refd). (paras 47, 48, 49 & 50)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit dengan kesalahan rogol dan bunuh di Mahkamah Tinggi. Bagi kesalahan rogol, beliau dihukum 20 tahun
G penjara dan 20 sebatan rotan sementara bagi kesalahan bunuh beliau telah dihukum mati. Perayu telah merayu ke Mahkamah Rayuan. Mahkamah Rayuan, setelah mendapati keputusan Mahkamah Tinggi sebagai tidak membantu, telah menilai dan memeriksa semula keterangan-keterangan, namun memutuskan
H untuk mengesahkan sabitan dan hukuman-hukuman yang dijatuhkan oleh Mahkamah Tinggi. Perayu merayu ke Mahkamah Persekutuan. Di Mahkamah Persekutuan beberapa alasan rayuan telah dibangkitkan. Antara lain, isu-isu penting yang dibangkitkan adalah berkaitan: (i) kuasa-kuasa rayuan Mahkamah Rayuan; (ii)

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sifat dan mutu keterangan pengecaman terhadap perayu; (iii) kebolehterimaan dokumen-dokumen yang dikeluarkan dari komputer di bawah s. 90A Akta Keterangan 1950; dan (iv) pendekatan mahkamah bilamana seseorang memilih untuk berdiam diri selepas kes *prima facie* dibuktikan oleh pendakwaan.

Diputuskan (menolak rayuan)
Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah Rayuan mempunyai kuasa untuk mengkaji atau menilai semula semua keterangan yang dikemukakan oleh pendakwaan, walaupun keputusan Mahkamah Tinggi ketandusan dapatan-dapatan spesifik dan tidak mengandungi alasan-alasan bagi dapatan-dapatannya. Dalam kes yang hanya melibatkan persoalan fakta semata-mata, Mahkamah Rayuan adalah bebas untuk memutuskan sama ada dapatan-dapatan yang dicapai oleh mahkamah bicara betul. Dalam kes semasa, walaupun keputusan Mahkamah Tinggi tidak membantu, Mahkamah Rayuan telah menimbang dan memeriksa semula semua keterangan yang dikemukakan oleh pendakwan secara kritikal. Mahkamah Rayuan telah memberikan sebab-sebab yang kukuh kenapa keterangan telah diterima-masuk dan bagaimana ia membabitkan perayu. Tiada salah laksana keadilan telah dilakukan terhadap perayu kerana keputusan Mahkamah Rayuan adalah berasaskan kepada keterangan saksi-saksi yang dipanggil oleh pendakwaan sepertimana yang direkodkan dalam rekod rayuan.

(2) Keterangan pendakwaan jelas menunjukkan bahawa saksi-saksinya (SP4 dan SP5) telah mengecam perayu secara positif. Mahkamah Rayuan malah tidak khilaf dalam memutuskan bahawa SP4 dan SP5 telah mengenal pasti perayu. Percanggahan dalam keterangan pengecaman saksi-saksi berkaitan baju yang dipakai oleh perayu adalah tidak material. Yang penting adalah pengecaman positif saksi-saksi akan wajah perayu. Selain itu, Mahkamah Rayuan telah memberi penjelasan yang munasabah berhubung perkara ini dalam alasan penghakimannya.

(3) Mahkamah Rayuan telah mencapai dapatan fakta yang betul mengenai isu kehilangan kad pengenalan perayu. Dapatan fakta ini dibuat berdasarkan keterangan yang dikemukakan oleh pendakwaan.

(4) Tiada keperluan bagi pendakwaan untuk mengadakan kawad cam dalam setiap kes. Di mana isu utama adalah menyentuhi identiti tertuduh atau bilamana kes terhadap seorang tertuduh keseluruhannya atau sebahagian besarnya bergantung kepada kebetulan satu atau lebih pengecaman tertuduh yang didakwa salah oleh pembelaan, maka panduan-panduan sepertimana yang disenaraikan oleh *Regina v. Turnbull & Anor* [1977] 1 QB 224 hendaklah diikuti dan kawad cam perlulah diadakan. Dalam kes semasa, pengecaman perayu oleh saksi-saksi tidak bergantung kepada pandangan sepintas lalu. Juga terdapat keterangan forensik dan sokongan lain yang mengaitkan perayu dengan jenayah. Dalam kes semasa, mutu keterangan pengecaman adalah baik dan masih berkeadaan begitu di sepanjang kes pendakwaan. Maka soal salah cam tidak berbangkit sama sekali. Jikapun kawad cam tidak diambilkira, saksi-saksi pendakwaan telah mengenal pasti perayu dengan secara positif.

(5) Sijil di bawah s. 90A(2) Akta Keterangan 1950 bukan satu-satunya cara untuk membuktikan bahawa suatu dokumen itu dikeluarkan oleh komputer 'dalam perjalanan penggunaannya yang biasa' di bawah s. 90A(1) Akta Keterangan 1950. Seksyen 90A(6) menangani soal kebolehterimaan suatu dokumen yang tidak dikeluarkan oleh komputer dalam perjalanan penggunaannya yang biasa dan hanya dianggap dikeluarkan dengan sebegitu cara. Fakta bahawa suatu dokumen telah dikeluarkan oleh komputer dalam perjalanan penggunaanya yang biasa boleh dibuktikan dengan mengemukakan ke dalam keterangan satu sijil di bawah s. 90A(2) atau melalui keterangan lisan. Keterangan lisan sedemikian hendaklah mengandungi bukan sahaja kenyataan bahawa dokumen telah dikeluarkan oleh komputer dalam perjalanan penggunaannya yang biasa tetapi juga tentang hal-hal yang dianggap di bawah s. 90A(4). Anggapan yang terkandung dalam s. 90A(6) Akta Keterangan 1950 hanya boleh digunakan bilamana dokumen tidak dikeluarkan oleh

komputer di dalam perjalanan penggunaannya yang biasa. *Gnanasegaran Pararajasingam v. PP* (dirujuk); *Hanafi Mat Hassan v. PP* (diikuti).

(6) Dalam kes semasa, tiada sijil telah dikemukakan di bawah s. 90A(2) bagi membuktikan laporan kimia. Selain itu, tiada keterangan lisan dikemukakan bagi menunjukkan bahawa laporan dikeluarkan oleh komputer. Bagaimanapun, laporan boleh dianggap sebagai dikeluarkan oleh komputer dalam perjalanan penggunaannya yang biasa di bawah s. 90A(6). Bukti mengenai hal-hal yang dirujuk di bawah s. 90A(4) juga dikemukakan melalui keterangan saksi (SP27). Maka laporan kimia, yang secara terus mengaitkan perayu kepada perbuatan jenayah yang dipertuduhkan, adalah boleh diterima-masuk.

(7) Pita-pita CCTV adalah dokumen-dokumen yang dikeluarkan oleh komputer berdasarkan definasi yang diberi kepada perkataan-perkataan 'dokumen' dan 'komputer' di bawah s. 3 Akta Keterangan 1950. Dalam kes semasa, oleh kerana pita-pita CCTV yang dikemukakan oleh pendakwaan gagal memuaskan kehendak-kehendak s. 90A, maka ianya tidak boleh diterima-masuk sebagai keterangan.

(8) Mahkamah Rayuan tidak khilaf dalam mendapati bahawa 'kain muslin' yang dirampas dari pejabat perayu adalah dari jenis yang sama dengan kain yang membaluti leher mangsa dan mengikati tangan mangsa. Ini adalah dapatan fakta yang munasabah mengambilkira: (i) peluang akses perayu kepada kain tersebut memandangkan ia mudah diperolehi dari tempat kerjanya; (ii) keterangan penjaga stor (SP 26) di tempat kerja perayu; dan (iii) keterangan ahli kimia (PW27), seorang pakar yang mempunyai banyak pengalaman dan kelayakan akademik dalam bidang penganalisaan kain-kain tenunan. Mahkamah Rayuan juga tidak khilaf dalam dapatan faktanya bahawa tiada orang lain yang terlibat dalam jenayah selain dari perayu sendiri.

(9) Perayu mempunyai peluang untuk melakukan jenayah-jenayah yang dipertuduhkan terhadapnya. Keterangan yang dikemukakan oleh pendakwaan telah membawa kepada inferens bahawa perayu berkemungkinan akan mengambil manfaat atas peluang tersebut.

(10) Hujah perayu bahawa Mahkamah Rayuan khilaf apabila mengesahkan sabitan-sabitan setelah menolak pengakuan-salahnya adalah tidak berasas. Tidak ada prinsip undang-undang bahawa sesuatu sabitan harus diketepikan apabila sahaja pengakuan-salah si tertuduh ditolak oleh Mahkamah Rayuan. Mahkamah Rayuan mempunyai budibicara untuk menilai semula keterangan-keterangan yang berbaki dan meneliti keterangan-keterangan lain secara menyeluruh, selain dari pengakuan-salah, bagi menentukan sama ada keterangan adalah mencukupi untuk memenuhi kesemua elemen-elemen pertuduhan terhadap perayu. Selepas mengambil langkah tersebut, Mahkamah Rayuan juga bertanggungan untuk meneliti sama ada keterangan mencukupi bagi mengesahkan sabitan-sabitan terhadap perayu. Dalam kes semasa, terdapat keterangan yang mencukupi di hadapan Mahkamah Rayuan untuk menyokong dapatan bersalah yang dibuat oleh hakim bicara. Oleh itu tidak berbangkit soal perbicaraan semula.

(11) Dalam kes semasa, mahkamah tiada pilihan melainkan untuk mensabitkan perayu atas kedua-dua pertuduhan kerana beliau gagal menyangkal keterangan-keterangan yang dikemukakan oleh saksi-saksi pendakwaan. Mahkamah Tinggi telah memutuskan bahawa suatu kes *prima facie* telah dibuktikan di akhir kes pendakwaan. Dalam mencapai keputusan tersebut, Mahkamah Tinggi telah bergantung kepada prinsip penilaian maksima (*Looi Kow Chai & Anor. v. PP* (diikuti)). Hak seorang tertuduh untuk berdiam diri tidak pernah dicabuli oleh prinsip "*if unrebutted would warrant a conviction*". Keterangan yang dikemukakan hendaklah sebegitu rupa bahawa ia akan menwajarkan sabitan jika tidak disangkal. Dalam kes semasa, kegagalan perayu untuk memanggil saksi-saksi lain untuk menyangkal kes pendakwaan tidak memberikan mahkamah pilihan lain melainkan untuk mensabitkan beliau (*Balachandran v. PP* (diikuti)).

Case(s) referred to:

Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523 HC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***
Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA ***(foll)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(foll)***
Mohamed Mokhtar v. PP [1972] 1 MLJ 122 ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
Regina v. Turnbull & Anor [1977] 1 QB 224 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180
Evidence Act 1950, ss. 3, 7(c), 90A(2), (4), (6)
Penal Code, ss. 302, 376

For the appellant - Mohamed Haniff Khatri Abdulla (Mohamad Nadzim Ibrahim, Rosal Azimin Ahmad & Amir Asree Meor Nordin with him); M/s Shamsuddin & Co
For the respondent - Dato' Nordin Hassan DPP

Reported by Andrew Christopher Simon

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] The appellant was charged in the High Court at Shah Alam on the following two charges:

First Charge

Bahawa kamu pada 14 Jun 2003, antara jam lebih kurang 1.00 pagi hingga 5.00 pagi, di Batu 7, Jalan Klang Lama, di dalam daerah Petaling, dalam negeri Selangor Darul Ehsan telah melakukan bunuh dengan menyebabkan kematian ke atas Ong Lay Kian (P) (KP No. 740718-08-5204) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

Second Charge

Bahawa kamu pada 14 Jun 2003, antara jam lebih kurang 1.00 pagi hingga 5.00 pagi, di Batu 7, Jalan Klang Lama, di dalam daerah Petaling, dalam negeri Selangor Darul Ehsan telah melakukan rogol ke atas Ong Lay Kian (P) (KP No. 740718-08-5204) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

[2] The learned judge of the High Court found the appellant guilty and convicted him on both charges. He was sentenced to death for the offence under s. 302 of the Penal Code and was sentenced to twenty years imprisonment and ordered to be given 20 strokes of the rottan for the offence under s. 376 of the Penal

A Code. He appealed to the Court of Appeal against the decision of the High Court. The learned judges of the Court of Appeal dismissed the appeal and affirmed the conviction and sentence in respect of both the charges. Being dissatisfied with the decision, the appellant now appeals to this court against the whole decision
B of the Court of Appeal.

The Case For The Prosecution

[3] The evidence adduced by the prosecution from the relevant prosecution witnesses may be summarized as follows:
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[4] On the night of 13 June 2003, Pearly a/p Visvanathan (PW3) together with her two daughters, Ong Lee Cheng and Canny Ong Lay Kian ("the deceased") had dinner together with friends of the deceased at Restoran Monte, Bangsar Shopping
D Centre (BSC) as a farewell for her before she returned to the United States on 14 June 2003. They went to BSC in a Proton Tiara bearing registration number WFN 6871 ("P145"). They arrived at BSC at about 8.30pm and had dinner there until about 10.30pm. When they were ready to leave, the deceased went to
E the basement car park alone to take the parking ticket which was left behind in the car P145 to make payment at the autopay station at the lower floor of BSC. PW3 and her other daughter, Ong Lee Cheng waited for the deceased at the lower floor. PW3 waited for about twenty minutes but the deceased still did not
F show up and when Ong Lee Cheng called the deceased's mobile phone, no answer was received and the call went to "voice mail". PW3 and Ong Lee Cheng then went down to the basement but failed to find the deceased. PW3 also discovered that their car P145 was not there. PW3 then lodged a report with a BSC
G guard, PW10 and later lodged a police report P10.

[5] On the same day, at about 11.15pm L/Cpl. Ravichandran a/l Subramaniam (PW4), a police officer together with a colleague were on crime prevention patrol duty at the Taman Perindustrian
H Jaya, Kelana Jaya area near Subang. There, PW4 noticed that a car had stopped beside the roadside. Half an hour later, PW4 and his colleague passed the same route again and noticed that the car P145 was still there. PW4 and his colleague stopped their motorcycle. PW4 then knocked on the glass window on the
I driver's side of the car P145. When the glass window was

lowered, PW4 saw that the driver was a male Malay and on the passenger seat was a female Chinese. PW4 shone his flashlight towards both of them and introduced himself as a police officer and showed them his authority card. PW4 then asked for the identity cards of the driver and the passenger. When the driver gave his identity card (P12), PW4 shone his flashlight at the identity card and asked the driver for his name. The driver answered that his name was Ahmad Najib bin Aris. PW4 then looked at the identity card (P11) given by the passenger and asked "awak Ong Lay Kian?" ("You are Ong Lay Kian?"). The passenger only nodded. At that time, the driver was wearing a cap. PW4 asked him to remove his cap. After the driver had removed his cap, PW4 compared the driver's face with the photograph in the driver's identity card and found them to be the same. PW4 identified the driver as the appellant and the female Chinese as the deceased. PW4 then asked the appellant to get out of the car but the appellant refused.

[6] Meanwhile, PW4 saw the deceased gesture to him by pressing both her palms together to her chest with the palms outwards facing the appellant and then making a prayer-like gesture. The deceased made this gesture when the appellant was looking at PW4 but when the appellant turned towards the deceased, the deceased stopped her gesture. When the appellant refused to get out of the car, PW4 tried to open the door of the car but at that time, the appellant sped off. PW4 fired two shots at the tyres of the car. PW4 and his colleague also attempted to pursue the car with their motorcycles but failed. The car seen by PW4 was similar to the photographs of the car P145 which are P7A and P7B which were shown to PW4. The appellant's identity card P12 and the deceased's identity card P11 were still with PW4 when the appellant sped off in the car. PW4 then lodged a police report (P13) about the incident.

[7] At about 12 midnight, Aminah bt. Ishak (PW5) was on her way to KLIA to pick up her sister in a Kancil car driven by her brother-in-law. They stopped their car in front of Bangunan Bali at Jalan Sungai Way. They stopped there to wait for another van which would also make the trip to KLIA but had turned back home to get a milk bottle. About twenty feet in front of the Kancil car PW5 saw a Proton Tiara (P145) car by the roadside. A man whom PW5 identified as the appellant then came out from the

said car towards the Kancil car and asked whether he could borrow a car jack. PW5 could see the man's face clearly as the surrounding area was well lit by street lights even though the appellant was wearing a cap. PW5 also saw a woman in the car P145 but the woman did not get out of the car. PW5 identified the woman as the deceased. PW5 noticed that the deceased appeared to gesture to her and also appeared to be frightened. The deceased gestured with her face in the direction of the appellant but when the appellant turned towards her, the deceased stopped her gesturing. PW5 then noted down the registration number of the Proton Tiara WFN 6871 on a piece of paper. When the appellant failed to open the screws to one of the tyres of the car P145, the appellant went off in the said car. PW5 then made a police report at the Subang Jaya police station about the suspicious incident and gave the registration number of the Proton Tiara to a police officer L/Kpl. Ruslan bin Hamzah (PW11). PW11 then took down the report and the registration number in his Station Diary (P21).

[8] At about 1am on 14 June 2003, Azizam bin Ismail (PW12), a technician with Syarikat UTIC (Utility Information Centre) was driving his company van to his office by way of Jalan Klang Lama. At a road construction area at Jalan Klang Lama, PW12 stopped the van to relieve himself. PW12 then scoured the area looking for a piece of wood to support the back seat of the van which was broken. PW12 then saw a Proton Tiara in the area which was later identified as P145. Inside the car P145, PW12 saw a woman with fair skin lying down at the back seat without her clothes and her breasts exposed. PW12 also saw the driver of the car who was a man with light hair and a wide forehead hurriedly running away from PW12. PW12 also saw that the front right tyre of the car had become deflated. The car P145 was then driven away from there. PW12 then went to his company office at Bukit Lanjan, Damansara. When PW12 came back from his office using the same Jalan Klang Lama route, he saw the same car P145 parked at the same place but a bit forward from before. PW12 then stopped the van and saw that nobody was in the car P145. PW12 then took a mobile phone (P129) belonging to the deceased and a sling-on bag with a Maybank Yippie logo (P23) from the back seat of the car P145. The sling-on bag with a Maybank Yippie logo (P23) contained:

(i) 3 condoms;

(ii) A lighter;

(iii) Cigarettes;

(iv) A ball pen; and

(v) Paper.

[9] PW12 then returned to his house at Jalan Gasing and then drove to Penang to meet his wife. PW12 also called his wife using the telephone P129 which he had taken from the car P145. On his way to Penang, PW12 sold the telephone P129 to a telephone vendor in Ipoh while the sim card P24 in P129 was sold to PW13.

[10] On 14 June 2003 at about 8pm, the car P145 was found by Constable Mohd Zulkefli bin Abdul Ghani (PW8) behind shop No. 49, Jalan Petaling Utama 1. He saw a lot of blood stains at the back seat of the car. The car P145 was then brought to the Petaling Jaya Police Station for further investigation. On 17 June 2003 at about noon, a burnt body was found by E. Soon Tai (PW6) in a manhole at Batu 7, Jalan Klang Lama. PW6 then called the police and informed them of his finding.

[11] DNA tests with a blood sample from the mother (PW3) and father (PW36) of the deceased confirmed that the body was that of Ong Lay Kian (the deceased). Pathology expert Kasinathan Nadeson (PW30) who conducted an autopsy on the deceased found a piece of cloth tied around the deceased's neck at least three rounds.

[12] Both the deceased's hands were tied with a cloth folded two or three times. The cause of death was strangulation by the cloth around the deceased's neck and PW30 did not dismiss the theory that the deceased died as a result of bleeding in the abdomen caused by a sharp weapon. On 20 June 2003 Supt. Ahmad Razali bin Yaacob (PW32) inspected the appellant's house at Lot 122, Jalan Pantai Permai 6, Kg. Kerinci, Pantai Dalam, Kuala Lumpur. In the appellant's room under a table a pair of Jack Blue Classic jeans (P68A) with a Calvin Klein belt (P68B) and a blue cap were found. The jeans had blood stains and DNA tests confirmed that it is the deceased's blood. PW30 who conducted the autopsy also

took a vaginal swab from the deceased and DNA tests by Primulapathi a/l Jayakrishnan (PW27) showed that it is the appellant's semen.

[13] The blood stains on the back seat (P57A) and driver's seat (P55A) of the car (P145) were confirmed to belong to the deceased. Six strands of hair (P56C) found in the car, based on DNA tests were also confirmed to be the deceased's hair. Besides that, DSP Amidon bin Anan (PW15) also found an unpaid BSC parking ticket (P20) on the dashboard of the car P145.

[14] A CCTV is installed at the basement of BSC and two CCTV tapes P19C and P19D were analyzed by forensic experts PW15 and PW16.

(a) On the analysis of the CCTV tape P19C, PW15 found:

– On 13 June 2003 at 8.24pm until 8.26pm, a Proton Tiara was seen as if searching for a parking lot (P29A, B & C).

– At 8.39pm an image of PW3 and the deceased walking near the 9C pillar towards the lift is seen (P29E).

– On 13 June 2003 at 8.49pm, an image of a man was seen walking at the parking area (P29F).

– On 13 June 2003 between 10.22pm and 10.24pm, the man is seen walking around the 9C pillar area.

– On 13 June 2003 at 10.32pm, an image of a Proton Tiara car is seen moving out of the parking area (P29K).

PW15 confirmed that the man in the CCTV tape P19C looks like the appellant. The appellant's image is seen carrying a sling bag with a strap and wearing a baseball cap.

(b) DSP Mohd Noor bin Ahmad (PW16) also video-captured the images (still photo) and used a "video investigator system" for "zooming" and "enhancement" on the images.

[15] The cloth tying the deceased's hand (P62A) was found to have the same colour, texture and composition with the muslin cloth (P82A) from the appellant's workplace at MAS which is used to clean airplanes. Sivakumar a/l Ramiah (PW26), a MAS

Storekeeper, said in his evidence that he normally saw the appellant coming to work carrying a sling bag with a Maybank logo similar to P29.

Findings Of The High Court

[16] The High Court having considered the oral and documentary evidence tendered by the prosecution at the close of the prosecution case ruled that a *prima facie* case had been made out by the prosecution. The learned judge of the High Court accepted the evidence of the prosecution witnesses PW4, PW5 and PW12 as to the identification of the appellant at the various scenes or locations where the appellant was found to have been with the deceased. The learned judge, after a trial within a trial to determine the admissibility of the confession (P122) made to the Magistrate by the appellant ruled that the confession was admissible in evidence. The learned judge also accepted the evidence of the Chemist (PW27) and the evidence of the DNA analysis and results (P83) with regard to the relevant exhibits produced by the prosecution. Based on the circumstantial evidence adduced by the prosecution the learned judge came to the conclusion that a *prima facie* case had been made out and called for the defence of the appellant. The appellant chose to remain silent after the three alternatives were explained to him. Upon the appellant choosing to remain silent the learned judge duly convicted the appellant on the two charges framed against him and passed sentence on him accordingly.

Findings Of The Court of Appeal

[17] The Court of Appeal held, *inter alia*, that the confession (P122) given by the appellant to the Magistrate which was held by the learned trial judge as being admissible was inadmissible. In arriving at the conclusion the Court of Appeal considered the evidence of what had transpired between the time when the appellant was given to the charge of ASP Muniandy a/l Shanmugam (PW44), the investigating officer until the time when he made the confession. This was to show the existence of circumstances that raised a strong suspicion that the appellant had been pressured by the police into making the confession. The appellant did not make the confession in a state of contrition but in the hope of getting a light sentence. Further, the Court of

A Appeal took the view that since the confession was inadmissible, it became necessary to undertake an examination and evaluation of the rest of the evidence in order to consider whether it warranted the conviction of the appellant for the rape and murder of the victim. The Court of Appeal accepted the evidence on the B identification of the appellant by PW4 and PW5. The Court of Appeal also accepted the evidence of the Chemist (PW27), the DNA (P83) evidence and its results as being in compliance with the requirement of s. 90A of the Evidence Act 1950 ("the Act"). Relying on circumstantial evidence the Court of Appeal found that C the evidence in its entirety led only to one conclusion, that it was the appellant and no one else who was responsible for what happened to the victim on that night. The Court of Appeal therefore dismissed the appeal and affirmed the conviction and sentence of the appellant.

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The Appeal

[18] Before this court the appellant in his petition of appeal had put forward 27 separate grounds of appeal for argument. The grounds in the petition of appeal were combined under six distinct E headings by learned counsel for the appellant in his submission before us. They are as follows:

(a) In the light of the findings of the Court of Appeal that the High Court judgment was of no assistance to the Court of F Appeal, the Court of Appeal thereafter erred, in undertaking an examination and evaluation on the rest of the evidence, on its own to consider whether it was safe to maintain the conviction, a process which is against the principles on appellate powers of the Court of Appeal in hearing an appeal.

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(b) The dissatisfactory manner in which the Court of Appeal accepted the issue of identification of the appellant by PW4 and PW5, and the reliance on the CCTV images (P19A-P19B and P29A-P29K) and the cursory manner in which the Court H of Appeal disregarded the accepted discrepancies with regard to the attire of the man (purportedly identified as the appellant).

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(c) The acceptance of the DNA report (P83) in breach of the requirements of s. 90A of the Act and the acceptance of the Chemist's (PW27) testimony on the issue that the muslin cloth (P82A) was of the same kind of fabric that was found around the neck or wrists of the victim (P59A and P61A).

(d) The erroneous findings that the appellant and no one else was possibly responsible for the crimes from all available evidence.

(e) Upon rightly rejecting the admissibility of the confession (P122), the Court of Appeal erred in its failure to consider setting aside the conviction, or at the very least to order a retrial after the end of the prosecution's case, and to allow the appellant to make a fresh decision as to whether to exercise his option to give sworn evidence or to remain silent.

(f) The need for this court to revisit the law on the burden of proof *vis-à-vis* the right to remain silent.

[19] I shall now deal with the above main grounds of appeal and other ancillary issues related to them.

Power Of Appellate Court To Review Or To Re-evaluate All Available Evidence

[20] As regards the first main ground of appeal raised by the appellant, I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings. In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial Court are correct. (See *Mohamed Mokhtar v. PP* [1972] 1 MLJ 122). In the present case even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from the

witnesses called by the prosecution as appearing in the appeal records. I am therefore of the view that the Court of Appeal did not err on this issue.

Identification Of The Appellant

[21] On the second ground of appeal in respect of the contention of the appellant that the Court of Appeal had erred in arriving at its finding of fact on the identification of the appellant by PW4 and PW5, I find that the evidence adduced by the prosecution clearly showed that PW4 and PW5 had positively identified the appellant. The relevant facts from the evidence of PW4 in relation to the identification of the appellant by PW4 can be narrated as follows:

(a) On 13 June 2003, at 11.15pm, PW4 saw a car at Taman Perindustrian Jaya, Kelana Jaya which was similar to the car P145.

(b) Half an hour later, after seeing that the car P145 was still there, PW4 inspected the car. When the car window was lowered, PW4 saw a male Malay and a Chinese woman in the car. PW4 shone his torchlight at both of them.

(c) PW4 then asked for both their identity cards. When PW4 received the identity card from the man, PW4 shone his torchlight at the identity card and asked the man what his name was. The man answered "Ahmad Najib bin Aris". After seeing the woman's identity card, PW4 asked "awak Ong Lay Kian" ("you are Ong Lay Kian") and the woman nodded her head.

(d) PW4 then asked the man to take off his cap so that he could compare the driver's face with the photograph in the identity card and found the face to be the same.

(e) When PW4 was inspecting the car P145, there were street lights and even without the torchlight, PW4 could identify the person in the car. PW4 questioned the man for about five minutes before the man sped off in the car P145, leaving behind his identity card P12 and the deceased's identity card P11 with PW4.

(f) When PW4 questioned the man, PW4 noticed that the Chinese woman in the car (the deceased) was nervous and it was as if she was trying to gesture to him for help and pointing at the appellant but when the appellant turned towards her, the deceased would stop making any gestures. This incident made it possible for PW4 to recognize the deceased and the appellant.

(g) In court, PW4 identified the appellant as the man in the car P145.

(h) During the identification parade, PW4 was also able to identify the appellant.

[22] From the evidence explained above, it is clear that PW4 had positively identified the appellant as the person who was with the deceased on the night of 13 June 2003.

[23] The relevant facts from the evidence of PW5 in relation to the identification of the appellant by PW5 can be narrated as follows:

(a) At about 12 in the morning of 14 June 2003, PW5 and his family were on their way to KLIA in a car and a van to pick up his sister who was arriving from Sabah. However, the car they were travelling in stopped at Bangunan Bali, Sungai Way to wait for the van which had turned back to get a milk bottle left at home.

(b) While waiting for the van, PW5 saw a Proton Tiara parked about 25 feet in front of the Kancil car, PW5 was in. PW5 saw a man coming out from the Proton Tiara to the Kancil car PW5 was in. The surrounding area was clearly lit by street lamps.

(c) The man came straight to PW5's brother-in-law and wanted to borrow a car jack. While speaking to PW5's brother-in-law, the man stood outside the car PW5 was in. PW5 was able to see the man's face clearly.

(d) PW5 also saw a woman seated at the front passenger seat but she did not come out of the Proton Tiara car. PW5 saw the woman from a close distance which was immediately in front of the Proton Tiara car.

(e) When the woman saw PW5, the woman looked as if she was making a gesture. Her eyes, face and mouth looked as if she was in fear and she was pointing with her face to the man who was borrowing the car jack. However, when the man turned towards her, the woman immediately stopped gesturing. The man however failed to open the screw to the tyre of the Proton Tiara and the man then hurriedly left the place in the Proton Tiara car.

(f) PW5 was in front of the Bangunan Bali for about twenty minutes. During cross-examination, PW5 maintained that she could identify the man's face. (See p. 97 of the appeal records).

(g) In court, PW5 identified the appellant as the said man.

(h) PW5 had also noted down the Proton Tiara registration number as WFN 6871 on a piece of paper (P145). PW5 then lodged a police report at the Subang Jaya Police Station. PW11 then received PW5's complaint and took it down in PW11's Station Diary.

(i) PW5 also identified the appellant in an identification parade.

[24] From the detailed evidence of PW5, it is clear that PW5 identified the appellant on that night in front of the Bangunan Bali. The issue of PW4 and PW5 identifying the appellant was considered by the Court of Appeal and based on the facts and the evidence, it is my considered view that the Court of Appeal did not err in deciding that PW4 and PW5 had identified the appellant.

Discrepancy

[25] On the discrepancy in the evidence of PW4 and PW5 with regard to the attire of the appellant as alleged by him, I am of the view that there can be inferences drawn from a set of facts and evidence. The evidence of PW4 was that the appellant wore a dark blue sweater and a dark coloured cap. The evidence of PW5 was that the appellant wore a light coloured shirt, a bright coloured pants and a bright coloured cap. The evidence of PW15 on the other hand when seeing the CCTV image was that the appellant wore a bright coloured shirt and a dark coloured pants.

[26] In my view the above discrepancies are not material as what is important is the positive identification by PW4 and PW5 of the appellant's face. Regarding the clothes PW4 saw the appellant wearing, which was a dark blue sweater as compared to the evidence of PW5 who saw the appellant wearing a light coloured shirt, the logical explanation is that when PW4 saw the appellant in the car on the night of 13 June 2003, it was a cold night with the appellant wearing a sweater. However, when PW5 saw the appellant in front of Bangunan Bali, the appellant could have taken off the sweater as he wanted to change a flat tyre. The appellant was also proved to have had a sling bag with a Maybank logo on it and the sweater could have been kept in the bag. In any event, it is normal for different witnesses to give different descriptions about what a person was wearing as each witness's observation and recollection varies from each other. The learned judges of the Court of Appeal had given a reasonable explanation based on the facts and inferences derived from the evidence as shown in their grounds of judgment on this point.

The Existence Of The Identity Card Of The Appellant And Police Report Lodged By The Appellant

[27] For the appellant it was also argued that the learned judges of the Court of Appeal had erred in arriving at their finding of fact that with the existence of the identity card and police report lodged by the appellant, it proved that the appellant was at the said locations as stated in the evidence. On this issue it is to be noted that on 14 June 2003, at 3.10pm, the appellant had lodged a police report (P18) about his missing identity card. This was confirmed by PW9 who took the complaint from the appellant and identified the appellant. A copy of P18 was found and seized from a table in the appellant's house. The fact that the appellant had lost his identity card and had lodged a report clearly showed that the appellant's identity card was not with him. This is consistent with the evidence of PW4 who said that he held the appellant's and the deceased's identity card when he asked the appellant some questions before the appellant sped away in the car P145 when PW4 asked the appellant to get out of the car.

[28] It is my judgment that the Court of Appeal had arrived at a correct finding of fact on the issue of the lost identity card and concluded that the appellant had lodged a false report on its loss. This finding of fact is based on evidence adduced by the

prosecution. PW4 could not have been in possession of both the identity cards of the appellant and the deceased if he did not receive it from the appellant and the deceased themselves.

The Identification Parade

[29] On the issue of the identification parade raised by the appellant that the police did not comply with accepted procedure in this case, it is my view that it is not in all cases that the prosecution is required to conduct an identification parade. I am of the view that it is only where the primary issue is the identity of the accused or whenever the case against an accused person depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken that the principles or the guidelines as laid down in the case of *Regina v. Turnbull & Anor.* [1977] 1 QB 224 need be followed and the identification parade conducted. In the present case it is to be noted that the identification of the appellant by PW4, PW5 and PW12 was not based on a fleeting glimpse as in *Turnbull*'s case. Unlike the facts in *Turnbull*'s case there are also other forensic and supporting evidence connecting the appellant with the crime in the present case. It is my considered view that the quality of the identification evidence of PW4, PW5 and PW12 in the present case is good and remains good throughout the prosecution's case and that the question of a mistaken identity cannot arise. Therefore even discounting the identification parade, the prosecution witnesses PW4, PW5 and PW12 had indeed positively identified the appellant.

The Admissibility Of The Chemist Report (P83) And The CCTV Tapes (P19A-D)

(a) Chemist Report (P83)

[30] Learned counsel for the appellant argued that under s. 90A of the Act, the prosecution must produce a certificate under s. 90A(2) of the Act to confirm that the Chemist Report (P83) was produced by a computer "in the course of its ordinary use" before P83 can be admitted as evidence. Section 90A of the Act reads as follows:

90A. (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which the computer was used.

(3) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects, throughout the material part of the period during which the document was produced.

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

A (7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was:

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(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

C

(b) in any manner or to any extent it involved, directly or indirectly, in the production of the document by the computer.

[31] I am of the view that a certificate under s. 90A(2) of the D Act is not the only method to prove that a document was produced by a computer "in the course of its ordinary use". On this point I would first like to cite the case of *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6 where Shaik Daud, JCA said at pp. 17-18:

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> On reading through section 90A of the Act, we are unable to agree with the construction placed by learned counsel. First and foremost, section 90A which had seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by
>
> F computers. As stated earlier, section 90A was added to the Act in 1993 in order to provide for the admission of computer-produced documents and statements as in this case. On our reading of this section, we find that under subsection (1), the law allows the production of such computer-generated documents or
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> G statements if there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. In our view, there are two ways of proving this. One way is that it 'may' be proved by the production of the certificate as required by subsection (2). Thus, subsection (2) is permissive and not mandatory. This can
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> H also be seen in subsection (4) which begins with the words 'Where a certificate is given under sub-section (2).
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> These words show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is
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> I produced by a computer, it is not incumbent upon them to also

produce a certificate under subsection (2) as subsection (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

[32] In appreciating the above passage it must first be observed that s. 90A(1) deals with the admissibility of a document which was produced by a computer in the course of its ordinary use as a matter of fact. It refers to a document that was produced by a computer in the course of its ordinary use. It is this requirement that must be proved. On the other hand s. 90A(6) deals with the admissibility of a document which was not produced by a computer in the course of its ordinary use and is only deemed to be so. This distinction is not recognized in the above passage and is addressed by Augustine Paul, JCA (as he then was) in *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269 at pp. 301-305:

A careful perusal of section 90A(1) reveals that in order for a document produced by a computer to be admitted in evidence it must have been produced by the computer in the course of its ordinary use. It is therefore a condition precedent to be established before such a document can be admitted in evidence under section 90A(1). The manner of establishing this condition has been prescribed. It can be proved by tendering in evidence a certificate as stipulated by section 90A(2) read with section 96A(3). Once the certificate is tendered in evidence the presumption contained in section 90A(4) is activated to establish that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced. Section 90A(4) must therefore be given its full effect as it has a significant role to play in the interpretation and application of section 90A. Ordinarily a certificate under section 90A(2) must be tendered in evidence in order to rely on the provisions of section 90A(3) and (4). However, the use of the words 'may be proved' in section 90A(2) indicates that the tendering of a certificate is not a mandatory requirement in all cases. In *PP v. Chia Leong Foo* [2000] 4 CLJ 649, a plethora of authorities was referred to in ruling that facts to be presumed can, instead, be proved by other admissible evidence which is available (at pp 722-723). Thus the use of the certificate can be substituted with oral evidence as demonstrated in *R. v. Shepherd* [1993] 1 All ER 225 in dealing with a provision of law similar to section 90A. Needless to say, such oral evidence must have the same effect as in the case of the use of a certificate. It follows that where oral evidence is

adduced to establish the requirements of section 90A(1) *in lieu* of the certificate the presumptions attached to it, in particular, the matters presumed under section 90A(4) must also be proved by oral evidence. In commenting on the nature of the evidence required to discharge the burden in such an event Lord Griffiths said in *R. v. Shepherd (supra)* at page 231:

> The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.

It must be added that the condition precedent in section 90A(1) coupled with the stipulation on the manner of its proof makes it clear in unmistakable terms that a document made admissible by the section is only one that was produced by a computer in the ordinary course of its use; and inapplicable to one that was not so produced.

The resultant matter for consideration is the proper meaning to be ascribed to the deeming provision in section 90A(6) in order to determine whether it can be a substitute for the certificate. A deeming provision is a legal fiction and is used to create an artificial construction of a word or phrase in a statute that would not otherwise prevail. As Viscount Dunedin said in *CIT Bombay v. Bombay Corporation* AIR [1930] PC 54 at page 56:

> Now when a person is "deemed to be" something the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were.

In commenting on the words "deemed to be" *The Law Lexicon* (7th Reprint Ed) by Ramanatha Aiyar says at page 302:

> No doubt the phrase "deemed to be" is commonly used in statutes to extend the application of a provision of law to a class not otherwise amenable to it.

Its primary function is to bring in something which would otherwise be excluded (see *Malaysia Building Society Bhd v. Lim Kheng Kim & Ors.* [1988] 3 MLJ 175). In *Ex parte Walton, In re Levy* [1988] 17 Ch D 746, it was held that in interpreting a

provision creating a legal fiction the court is to ascertain for what purpose the function is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect of the fiction. It would be proper and even necessary to assume all those facts on which alone the fiction can operate (see *Shital Rai v. State of Bihar* AIR [1991] Pat 110 (FB)). In so construing a fiction it is not to be extended beyond the purpose for which it is created (see *In re Coal Economising Gas Company* [1875] 1 Ch D 182) or beyond the language of the section by which it is created (see *CIT Bombay City II v. Shakuntala* AIR [1966] SC 719). The fiction in the realm of law has a defined role to play and it cannot be stretched to a point where it loses the very purpose for which it is invented and employed (see *Bindra's Interpretation of Statutes,* 9th edn, p 72). It is required by its very nature to be construed strictly and only for the purpose for which it was created; and its application cannot be extended (see *FCT v. Comber* [1986] 64 ALR 451). Thus it cannot be pushed so far as to result in a most anomalous or absurd position (see *Ashok Ambu Parmar v. Commr of Police, Badodara City* AIR [1987] Guj 147).

It must be remembered that the purpose of tendering in evidence a certificate under section 90A(2) is to establish that a document was produced by a computer in the ordinary course of its use. On the other hand section 90A(6) deems a document produced by a computer to have been produced by the computer in the course of its ordinary use. They are incompatible and inconsistent with each other. A fact cannot be deemed to have been proved which specific provision has been made for the mode of proof of the same fact. If therefore section 90A(6) is to function as a substitute for the certificate it will render nugatory section 90A(2). This will not accord with the basic rules of statutory construction. It is perhaps pertinent to bear in mind *Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd* AIR [1962] 1543 where Gajendragadkar J said at page 1551:

> In construing section 76(1) and (2), it would be necessary to bear in mind the relevant rules of construction. The first rule of construction which is elementary, is that the words used in the section must be given their plain grammatical meaning. Since we are dealing with two sub-sections of section 76, it is necessary that the said two sub-sections must be construed as a whole "each portion throwing light, if need be, on the rest". The two sub-sections must be read as parts of an integral whole and as being inter-dependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and

A to avoid repugnancy. If repugnancy cannot possibly be avoided, then a question may arise as to which of the two should prevail. But that question can arise only if repugnancy cannot be avoided.

B Every effort must thus be made to reconcile both the sub-sections in order to avoid a conflict between them.

Such a reconciliation exercise will be greatly facilitated by a consideration of the object of section 90A(6). Section 90A(1) provides for the admissibility of a document produced by a C computer in any criminal or civil proceeding. Such a document is in fact a reference to a document whether or not it was produced by a computer after the commencement of any criminal or civil proceeding. Accordingly, the applicability of section 90A(6) to documents produced by a computer '… whether or not …' They were produced after the commencement of any criminal or civil D proceeding etc. will strike at the very foundation of section 90A(1) as those documents constitute the very basis of the section. It will result in section 90A(1) being rendered otiose. Such documents cannot therefore be within the contemplation of section 90A(6). So section 90A(6) must have some other purpose to serve. Its true scope and meaning will become clear if it is read in the light of E section 90C. It provides that the provisions of sections 90A and 90B shall prevail over any other provision of the Evidence Act 1950 thereby making section 90A the only law under which all documents produced by a computer are to be admitted in evidence. There may be instances when a document which is F sought to be admitted in evidence may not have been produced by a computer in the course of its ordinary use even though it is one that is contemplated by section 90A(1). The document, even though produced by the computer, may not have anything to do with the ordinary use of the computer. It may, for example, be a G letter produced by the computer which has no bearing on the ordinary use of the computer. Yet it is still a document produced by a computer. How is this document to be admitted in evidence bearing in mind the prevailing effect of section 90C in making all documents produced by a computer admissible only under section 90A if the condition precedent to its admissibility under section H 90A(1) cannot be fulfilled by virtue of it not having been produced by the computer in the course of its ordinary use? It is this question that is answered by section 90A(6). The sub-section does not contain the condition precedent and, instead, contains a deeming provision to the same effect. As its purpose is to render a document produced by a computer to be one that is produced I by the computer in the ordinary course of its use it can only

apply to a document which is not produced by the computer in the ordinary course of use. It is incongruous to deem a document to have been produced by a computer in the ordinary course of its use when it is such a document already. This will become clear if it is recalled that the object of a deeming provision is to create an artificial status for something when in reality it is not. As stated earlier the function of a fiction is to extend the application of a provision of law to a class not otherwise amenable to it. Thus section 90A(6) can only apply to a document which was not produced by a computer in the ordinary course of its use, or, in other words, to a document which does not come within the scope of section 90A(1). Thus it cannot apply to a document which is already one that is produced by a computer in the ordinary course of its use. It cannot therefore be used as a mode of proof to establish that such a document was so produced. The document must be proved in the manner authorized by section 90A(2). It can now be discerned with ease that section 90A(6) has its own purpose to serve and can never be a substitute for the certificate.

[33] I agree with the views expressed in the above passages from *Hanafi Mat Hassan v. Public Prosecutor* in the analysis of s. 90A. In substance therefore the fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under s. 90A(2) or by way of oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but also the matters presumed under s. 90A(4). On the other hand the presumption contained in s. 90A(6) can be resorted to only when the document was not produced by a computer in the course of its ordinary use.

[34] In this case no certificate was tendered as required by s. 90A(2) for proof of the chemist report (P83). Neither was any oral evidence adduced to show that the report was produced by a computer in the course of its ordinary use. It therefore remains that the only evidence available is that the report was produced by a computer. It is thus appropriate to resort to s. 90A(6) to presume that the report was produced by the computer in the course of its ordinary use. With regard to proof of the matters under s. 90A(4) the oral evidence of PW27 is relevant when he said:

> Saya tidak setuju saya tidak boleh sahkan computer, program dan kit DNA itu tidak berfungsi dengan teratur (proper working order). Saya boleh sahkannya. Sekurang-kurangnya saya telah buat ujian enam kali dengan genotyper dalam kes ini. Sebelum buat ujian saya telah periksa samada computer itu dalam keadaan baik atau tidak. (See page 338 of the Appeal Records).

The chemist report (P83) is therefore admissible in evidence.

[35] The contents of the chemist report (P83) have the direct effect of linking the appellant to the commission of the offence of murder and rape by him of the deceased. Firstly, in the appellant's room at his house in Kg. Kerinci, Pantai Dalam, Kuala Lumpur a pair of Jack Blue Classic Jeans was found. It had blood stains and the DNA tests confirmed that it is the deceased's blood. Secondly, PW30 who conducted the autopsy on the deceased took a vaginal swab from her. The DNA tests of the swab by PW27 proved that it is the appellant's semen. Thirdly, the blood stains on the back seat (P57A) and driver's seat (P55A) of the car (P145) were confirmed to be that of the deceased. Fourthly, six strands of hair (P56C) found in the car, based on DNA tests, were also confirmed to be that of the deceased.

(b) The CCTV Tapes (P19A-D)

[36] Learned counsel for the appellant submitted that the Court of Appeal erred in law in admitting the CCTV tapes (P19A-D) as evidence against the appellant. In the Court of Appeal the arguments focused by the appellant and the prosecution principally on the weight to be attached to these CCTV tapes and the images of the appellant produced from them. The appellant contended that the CCTV images of the appellant cannot be relied on for his identification as there were many discrepancies as regards the attire of the man purportedly identified as him besides the images being unclear. The prosecution on the other hand contended that the images may be quite unclear but that did not mean that the CCTV tapes could not be admitted as evidence. It was further contended by the prosecution that only the "weight to be attached" needs the court's consideration and the prosecution is relying on the CCTV tapes merely as corroboration of the evidence given by PW4, PW5 and PW6.

[37] Notwithstanding the above arguments advanced on behalf of the appellant and the prosecution, I am of the view that before the CCTV tapes can be admitted as evidence it must be considered whether they are documents produced by a computer. A CCTV tape clearly falls within the definitions of "document" and "computer" under s. 3 of the Act.

[38] Under s. 3 of the Act "document" is defined as follows:

> 'document' means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of:
>
> (a) letters, figures, marks, symbols, signals, signs or other forms of expression, description, or representation whatsoever;
>
> (b) any visual recording (whether of still or moving images);
>
> (c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;
>
> (d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c),
>
> or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter.

[39] A "computer" is defined in the same section as follows:

> 'computer' means any device for recording, storing processing, retrieving or producing any information or other matter, or for performing any one or more of those functions, by whatever name or description such device is called; and where two or more computers carry out any one or more of those functions in combination or in succession or otherwise howsoever conjointly, they shall be treat as a single computer.

[40] A CCTV tape is therefore a document produced by a computer. It follows that the CCTV tapes (P19A-D) must satisfy the requirements of s. 90A of the Act before they can be admitted in evidence. As this had not been done they are inadmissible.

A **Whether The "Muslin Cloth" (P82A) Was Of The Same Kind Of Fabric That Was Found Around The Neck Or Wrists Of The Deceased**

[41] The appellant has also alleged that the Court of Appeal
B erred in arriving at their finding of fact that the "muslin cloth" (P82A) which was seized from the appellant's office is the same as the cloth wrapped around the deceased's neck or tied around the deceased's hands (P59A) and (P61A). On this issue I am of the view that the Court of Appeal did not err because it had
C made a reasonable finding of fact based on the opportunity of access that the appellant had to the "muslin cloth" (82A) which could be obtained from the appellant's workplace. The evidence of MAS Storekeeper PW26 on this issue was accepted by the Court of Appeal in proving this fact. The Court of Appeal had also
D discussed this issue in detail regarding the access to this cloth. The Court of Appeal had also given detailed reasons as to why PW26's evidence was accepted.

[42] Still on the issue of the "muslin cloth", there is the evidence
E of the chemist (PW27) to be considered. He is an expert based on his academic qualification, the courses he undertook, the training and his vast experience in fabric analysis. Therefore, PW27 is qualified to give evidence on the texture and composition of the "muslin cloth" (P82A). PW27 had conducted several tests such as
F the microscopic test, sulphuric acid test, quantitative test, burning test and weave pattern test and arrived at a finding and conclusion that the "muslin cloth" (P82A) which was obtained by the investigating officer from the appellant's workplace is of the same type of cloth as that tied to the deceased's wrist. This
G evidence is another link between the appellant and the deceased. It is to be noted that PW27, during cross-examination, did say that the "dissolvent and burning test" was not conclusive but the microscopic test was conclusive as based on such test, the "pattern of weave of the materials" can be determined. The
H appellant's counsel did not cross-examine PW27 on the microscopic test in terms of its "reliability of comparison by pattern of weave." I am of the view that all the tests conducted by PW27 when combined lead to the conclusion that the "muslin cloth" (P82A) is of the same type as the cloth found tied around
I the deceased's wrists.

Whether There Was Any One Else Involved In The Commission Of The Crime

[43] On the contention of the appellant that the Court of Appeal erred in arriving at their finding of fact that there was nobody else involved in the crime other than the appellant himself, I am of the view that the Court of Appeal is justified in making such a finding. The appellant alleged that the heavy concrete tyre covering the deceased's body showed that many people were involved. On this point I find that the evidence of the investigating officer (PW44) clearly shows that it is possible that the tyre was pulled and dragged before it was pushed into the manhole. This can be done as there is a handle on the tyre which makes it possible for the tyre to be pulled and dragged. In fact, PW44 even demonstrated in court how it could be done.

[44] The appellant claimed that it is impossible for him to lift the concrete tyre to the manhole where the body was found. The appellant argued that as the concrete tyre was beside the road divider it was impossible for the appellant to lift it. There is no evidence to show the tyre's exact origin before it was put on top of the manhole. Therefore, the appellant has no basis to raise this issue. The Court of Appeal had considered this issue carefully and had reached a finding which is supported by evidence. It is my view that undue consideration should not be given to this evidence as the act of covering the body is an act "after the event" which is after the deceased died from strangulation and/or massive loss of blood. The concrete tyre could not have caused any internal bleeding as blood stains were found even in the car.

Evidence Of Existence Of The Opportunity To Commit The Crime

[45] It must also be noted that the appellant had the opportunity to have committed the crime. (See s. 7 and illustration (c) of the Evidence Act 1950). The evidence of opportunity in this case has been supplemented by proof of circumstances of such a nature as to lead to the inference that it was probable that advantage would be taken by the appellant of the opportunity. (See *Aziz bin Muhamad Din v. PP* [1997] 1 CLJ Supp 523). The evidence adduced by the prosecution showed that the appellant was seen together with the deceased by the prosecution witnesses, PW4, PW5 and PW12 through the sequence of events taking place at the various locations.

A **Whether There Should Be A Retrial Upon The Rejection Of The Appellant's Confession**

[46] The appellant further contended that the learned judges of the Court of Appeal erred in their evaluation of the prosecution
B evidence after having rejected the appellant's confession (P122) and thereafter affirming the conviction. It was argued that the Court of Appeal should have set aside the conviction or alternatively made an order for a retrial after the end of the prosecution's case and allowing the appellant to make a fresh
C decision as to whether to exercise his option to give sworn evidence or to remain silent. On this issue it is my considered view that the appellant's contention is without basis as there is no legal principle that a conviction should be set aside when a confession by the accused is rejected by the Court of Appeal. The Court of
D Appeal has the discretion to re-evaluate the remaining evidence and to scrutinize in totality such other evidence, apart from the confession to determine whether the evidence is sufficient to satisfy all the elements of the charges against the appellant. After all such steps have been taken, the Court of Appeal is obliged to
E scrutinize whether the evidence is sufficient to affirm the conviction against the appellant. (See *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337). The question of whether an order for a retrial should be made at the end of the prosecution's case therefore does not arise in this case since the evidence available before the
F Court of Appeal is sufficient to support the finding of guilt made by the trial judge. On the same issue it is untenable for learned counsel for the appellant to contend that the appellant should be allowed to make a fresh decision as to whether to exercise his option to give sworn evidence or to remain silent if this court is
G to order a retrial at the end of the prosecution's case. The appellant has been accorded the advantage of a full trial process under the law before the trial judge. Whatever rights and option he has as to whether to give sworn evidence or to remain silent must be exercised in that trial unless an Appellate Court on appeal
H had made an order setting aside the conviction and ordering a retrial.

I

Burden Of Proof *Vis-à-Vis* Right To Remain Silent

[47] Learned counsel for the appellant had also argued of the need for this court to revisit the law on the burden of proof *vis-à-vis* right to remain silent. It is the contention of the appellant that the insertion of the phrase "*prima facie* case" in the new s. 180 of the Criminal Procedure Code ("CPC") (Act 593), upon the deletion of the phrase "if unrebutted would warrant a conviction" as in the old s. 180 CPC, had created a further problem in the absence of a clear definition of the phrase "*prima facie* case" within the new s. 180 CPC. Learned counsel for the appellant submitted that problems will arise as to the effect of applying the test of maximum evaluation of the prosecution evidence, upon an accused exercising his right to remain silent. Learned counsel for the appellant also submitted that the position of the law in relation to an accused person exercising his right to remain silent, as pronounced by the Court of Appeal in the case of *Looi Kow Chai & Anor. v. PP* [2003] 1 CLJ 734 would not only be in defiance of the correct burden of proof under the new s. 180 CPC, but also would reduce the coronated status of the substantive right to remain silent to a mere illusory right.

[48] With respect to the above argument of learned counsel for the appellant, I am of the view that when the appellant chooses to remain silent, the court is put in a situation where it has no other choice but to convict the appellant on both charges as the appellant had failed to rebut the evidence adduced by prosecution's witnesses. The High Court in the present case at the end of the prosecution's case had ruled that a *prima facie* case has been made out and in coming to that decision, the court had relied on the maximum evaluation principle as laid down in the earlier decided cases of the appellate courts. In the case of *Looi Kow Chai & Anor. v. PP (supra)* the Court of Appeal at p. 752 said:

> It therefore follows that there is only one exercise that a judge sitting alone under section 180 of the code has to undertake at the close of the prosecution case.
>
> He must subject the prosecution evidence to maximum evaluation and asks himself the question, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then, no *prima facie* case has been made out and the accused would be entitled to an acquittal.

[49] It was also explained in that case that there is no burden on the prosecution to prove a case beyond reasonable doubt at the end of the prosecution's case. This was stated at p. 757 as follows:

> If the passage is meant to suggest that the evidence led by the prosecution must receive maximum evaluation, then we would agree with it. But if what is meant is that the court ought to go further and determine whether the prosecution at the end of its case has proved the case against the accused beyond a reasonable doubt, then we find ourselves in disagreement with the learned judge in that case. In our view, subjecting the evidence of the prosecution to maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage.

[50] It is my view that an accused's right to remain silent is not at all infringed by the principle of "if unrebutted would warrant a conviction". It means what it says. The evidence adduced must be such that it must warrant a conviction if it is unrebutted. Therefore, the appellant's failure to call other witnesses to rebut the prosecution's case leaves the court with no other alternative but to convict him.

[51] In dealing with the question as to the position of the law at the end of the prosecution's case and the steps to be taken by the trial judge, useful reference may be made to the judgment of this court in *Balachandran v. PP* [2005] 1 CLJ 85 where the following pronouncements were made:

(a) In deciding whether a *prima facie* case has been established under the new s. 180 CPC, a maximum evaluation of all the evidence adduced by the prosecution must be done and a *prima facie* case is one that is sufficient for the accused to answer, and the evidence adduced must be such that it can only be surmounted by evidence in rebuttal.

(b) If the evidence is unrebutted, and the accused remains silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain silent, which if answered in the affirmative, means that a *prima facie* case has been made out.

(c) Whenever the accused has chosen to remain silent, there is no necessity to re-evaluate the evidence to determine whether there is a reasonable doubt in the absence of any further evidence.

Conclusion

[52] It is my judgment that the Court of Appeal had made a correct finding in relying on the contents of the chemist report (P83), the circumstantial evidence and the evidence in its entirety to come to the conclusion that it was the appellant and no one else who was responsible for what happened to the deceased on that night. For the reasons already stated I would dismiss the appellant's appeal. The conviction recorded and the sentence on the two charges passed by the High Court and affirmed by the Court of Appeal are hereby affirmed.

[53] My learned brothers Arifin bin Zakaria CJ (Malaya), Nik Hashim bin Nik Ab. Rahman, Augustine Paul and Hashim bin Dato' Hj. Yusoff, FCJJ, have seen this judgment in draft and have expressed their concurrence.